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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 598

FREDERIC HENRY,
Petitioner,

v.

GENERAL COURTNEY H. HODGES, COMMANDING GENERAL, FIRST ARMY, FORT JAY, NEW YORK,
Respondent.

PETITION OF FREDERIC HENRY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Glossary of Military Law Abbreviations

A. W.—Articles of War (10 U.S.C. 1471-1593).

B. R.—Holdings of the Board of Review in the Office of the Judge Advocate General.

B. R. E.T.O.—Holdings of the Board of Review in the Branch Office of the Judge Advocate General in the European Theatre of Operations (A. W. 50½).

M. C. M.—Manual for Courts-Martial, U. S. Army (1928), corrected to 1943.

T. M.—War Department Training Manual.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Frederic Henry, the petitioner, prays that a writ of certiorari issue to review the order and judgment entered in the United States Court of Appeals for the Second Circuit on November 29, 1948, and the order denying petitioner's motion for a rehearing, entered December 16, 1948. The said order and judgment reversed an order of the United States District Court for the Southern District of New York, entered on March 31, 1948 which had granted petitioner's petition for a writ of habeas corpus and directed that petitioner be released from custody.

The aforesaid order of the United States Court of Appeals for the Second Circuit, which denied a rehearing, stayed the issuance of the mandate until the petitioner's time to apply to this court for a writ of certiorari has expired. Continuation of the stay is hereby sought.

The petition for the writ of habeas corpus sought petitioner's discharge from the custody of the respondent where he was serving the balance of a sentence imposed by a General Court Martial at Regensberg, Germany, in June 1947 while the petitioner was serving in the Army of the United States. The writ was sought on the ground that the General Court Martial was without jurisdiction to try the petitioner because of failure to comply with Article of War 70 (Title 10, U.S.C. Section 1542) and Article of War 8 (Title 10, U.S.C. Section 1479).[1] The District Court held with petitioner on the first point only and the Court of Appeals for the Second Circuit held against petitioner on both points.

Opinions Below

The opinion of the District Court for the Southern District of New York granting the writ of habeas corpus is reported in *Henry* v. *Hodges*, 76 Fed. Supp. 968. The opinion of the Court of Appeals for the Second Circuit is reported in 171 Fed. (2nd) 401 (17 U. S. Law Week 2258). Both opinions are contained in the record.

Jurisdiction

The jurisdiction of this Court for a writ of certiorari to review the order of November 29, 1948 by the United

1. The Articles of War pertaining to court martial have recently been amended, but reference in this petition is made to the Articles of War and the law prior to their amendment, which became effective February 1, 1949.

States Court of Appeals for the Second Circuit is invoked under Title 28, United States Code, Section 1254, effective September 1, 1948 and Rules 38, c, 5 (b) of the Rules of the Supreme Court.

Questions Presented

A

1. Whether petitioner was deprived of the benefit of Article of War 70 (Title 10, U.S.C. Section 1542) which provides that, "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made," where the officer who was assigned to make a preliminary investigation into the alleged theft of a quantity of silver and who after making such investigation, expressed an opinion as to petitioner's guilt in the affair, was later appointed to make the "thorough and impartial" investigation provided for under the statute?

2. Whether the general court martial before which petitioner was tried was improperly constituted under Article of War 8 (Title 10, U.S.C., Section 1479) because the law member assigned to the court was not an officer of the Judge Advocate General's Department, when two members of said department were available and neither was appointed to the general court martial?

B

The significant portion of Article of War 70 (Title 10, U.S.C., section 1542) reads:

> "Art. 70. Charges; Action Upon.—Charges and specifications must be signed by a person subject

to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief."

"No charge *will be referred* to a general court martial for trial *until after a thorough and impartial investigation thereof* shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides." (Italics ours.)

We shall show that this section is mandatory and jurisdictional. The record shows that one Captain Ira Meyers was detailed to investigate missing silver. He reported in writing to the commanding officer that Captain Henry appeared to be guilty of the theft. Upon his report, the commanding officer filed charges against Henry. To make this thorough and impartial investigation under Article of War 70 the commanding officer appointed this same Captain Meyers. Petitioner claims this was not only contrary to the provisions of Article of War 70, but was without precedent in army military courts martial.

The petitioner did not, therefore, receive the benefit of a "thorough and impartial investigation" without

which no charge can even be referred to a general court martial for trial. He was, therefore, deprived of that due process of law, which is accorded even those in the military service, or as the District Court concluded:

> "Justice is achieved only when an accused is given fully of the rights guaranteed him by the laws of our country; here, this was not done."

The decision of the Second Circuit is directly opposed to *Smith* v. *Hiatt*, 170 Fed. (2nd) 61, now styled *Humphrey* v. *Smith*, certiorari granted, 17 U. S. Law Week. 3236, Case No. 457. In fact, this is a much stronger case. In *Smith* v. *Hiatt* the investigating officer only assisted the British police in making an arrest. He did not express an opinion as to the guilt of the accused, but nevertheless, was held to be disqualified to act under the provisions of Article of War 70. In this case, Captain Meyers made the preliminary report which directly led to charges being filed on his recommendation against Henry. How, under such circumstances, could he thoroughly and impartially make an investigation required by Article of War 70?

In reference to the second question, Article of War 8 (Title 10, U.S.C., Section 1479) provides:

> "The authority appointing a general court martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose, the appointing officer shall detail instead an officer of some other branch of the service selected by the appointing authority as especially qualified to perform the duties of the law member."

This language is clearly mandatory, and requires that a member of the Judge Advocate General's Department,

when available, shall be appointed on the General Court Martial. The record shows that Lieutenant Swan was assigned as Trial Judge Advocate and Lieutenant Colonel Beatty assigned to defend Lieutenant Felman, a co-defendant. Both were members of the J.A.G.D. and available to serve as law members, but neither was appointed.

The Court of Appeals for the Second Circuit held that Article of War 8 was not mandatory, but purely discretionary. In this, the decision is directly contrary to *Brown* v. *Hiatt,* Fed. Supp. (N. D. Ga.) (17 U. S. Law Week. 2247).

It has always been the law that if a general court martial was not properly constituted, the trial was a nullity. See *McClaughry* v. *Deming,* 186 U. S. 49, 63; *In re Runkle,* 122 U. S. 543.

We shall show that Congress always intended that Article of War 8 should be considered mandatory, but because abuse of this section in practice became so widespread, Congress has now by the clearest kind of language told the Army not to violate its provisions in the future. However, as Article of War 8 was previously written it was mandatory, not directory, and in this case the undisputed evidence is that in the general court martial of Henry the provision was flagrantly violated.

Summary Statement of the Matter

Since the Court of Appeals for the Second Circuit approved the statement of facts of the District Court, we shall adhere closely to the outline set forth in the opinion of the District Court (76 Fed. Supp. 968). By stipulation, the petition for the writ of habeas corpus, the writ, the return and the general court martial records constituted the entire record of the proceedings.

The petitioner, Frederic Henry, a young graduate of Williams College, enlisted in the Army of the United States on December 17, 1942. He served as an enlisted man until September 14, 1943 when he received a commission as a second lieutenant. He had a record of honorable, faithful and creditable service until his conviction in June 1947 at which time he held the rank of captain.

During the year 1946, there was a question of a shortage of silver bullion that had been placed in the custody of a Military Government Detachment stationed at Waldmünchen, Germany. Henry, then a captain, commanded this detachment. The Commanding Officer of Company D, Third Military Government Regiment by verbal order detailed, assigned and directed Captain Meyers to make a general survey of the matter in September 1946. The details of this survey were set forth in a written report consisting of eight typewritten pages (Exhibit 14, General Court Martial Proceedings). In this report, Captain Meyers reported among other things:

> "2. A large number of witnesses have been interviewed in connection with this case. From a review of their testimony, it can be seen that there are certain discrepancies in regards to sizes and quantities.
>
> * * * * * * *
>
> "4. From the testimony and evidence presented the following general conclusions are drawn:
>
> "a. Silver plate was illegally cut and taken by several MG officers.
>
> * * * * * * *
>
> "c. Capt. Henry appears to be the main figure in the affair, although it is apparent that Lt. Felman shared to a great extent in the spoils."

This report was made on October 10, 1946. On October 25, 1946 based on this report, charges were filed by the Commanding Officer charging Henry with violations of the 93rd Article of War (Title 10, U.S.C., Section 1565) and the 96th Article of War (Title 10, U.S.C., Section 1568). The charges were to the effect that Henry had embezzled silver and unlawfully authorized the use of government transportation.

After the charges were filed, it is necessary to follow the provisions of Article of War 70 (Title 10, U.S.C., Section 1542) which provides:

> "No charges will be referred to a general court martial for trial *until after a thorough and impartial investigation shall have been made.*" (Italics ours.)

To make this thorough and impartial investigation, the commanding officer appointed this same Captain Ira Meyers, who had made the survey report on which the charges against Henry were filed. Thus, Captain Meyers, who had reported that petitioner appeared to be the main figure in the affair and who thereby became tainted with partiality, was selected to make the impartial investigation under Article of War 70. He naturally reported that the charges should be referred to a general court martial.

When the court martial detail was announced, Colonel Clarence K. Darling, a Cavalry officer, was named both president and law member of the court. He was not a member of the Judge Advocate General's Department. He had no legal experience, and the record will show that many of his rulings and his attitude were highly prejudicial to Henry.

In the detail for the court Lieutenant Swan was named as Trial Judge Advocate and Lieutenant Colonel Beatty

named defense counsel for Lieutenant Felman, jointly charged with Henry. Both Lieutenant Swan and Lieutenant Colonel Beatty were lawyers and members of the Judge Advocate General's Department.

Article of War 8 (Title 10, U.S.C., Section 1479) provides in part:

> "The authority appointing a general court martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose, the appointing officer shall detail instead an officer of some other branch of the service selected by the appointing authority as especially qualified to perform the duties of the law member."

While both Lieutenant Swan and Lieutenant Colonel Beatty, members of the J.A.G.D. were available, neither was appointed to the court as law member. As stated before, the law member was a Cavalry Officer.

As early as December, 1946, the civilian defense counsel for Henry called attention to the fact that Captain Meyers had been disqualified to act as investigating officer under Article of War 70, but no effort was made to correct the situation by appointing another investigating officer.

At the trial held in Regensberg, Germany, the questions of Captain Meyers' disqualification, and the failure to appoint a member of the J.A.G.D. as law member of the court were raised by appropriate motions and challenges, but the general court martial overruled the pleas.

The record on this point is clear and unequivocal. The following is found in the record (Court Martial Proceed-

ings 18-19 and also in the District Court opinion in 76 Fed. Supp. 968, 974):

> "The defense objects to this court further considering this case, in that Article of War 70 has been violated; that Capt. M., who filed a report of investigation accusing Captain Henry of the offenses for which he is now charged which predated the filing of these charges by fifteen days, is not an impartial investigating officer as is required by Article of War 70. In judicial precedent for this motion, I refer to—may I read a portion of the Article of War which is pertinent here, the second paragraph:
>
> > 'No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made.'
>
> "The pre-trial investigating officer, as I say, reported prior to the origin of these charges, prior to their being filed, that Captain Henry, was guilty of the offense for which he is now to be tried."

And he further stated (at p. 19):

> "When I was first appointed, or rather made available, as counsel in this case—before the USFET regulation about civilians—I was directed by OMGB to appear for Captain Henry. At that time I went to Col. H., at the 3rd Military Government Regiment, in December, 1946, and told him that this in my opinion was a violation and my suggestion was to have the charges withdrawn, refiled, re-investigated, and run the thing legally. This isn't a shyster trick to try to draw things out to the last minute. This was raised in December.
>
> • • • • • • •

"I have to wait until the case comes to trial, but I don't want the court to believe that I am trying to stall things to the last minute. This question was raised the minute I came into the picture, and that was last December."

After this objection was made both Henry and Captain Meyers testified, but the objections to the jurisdiction both on the investigations and constituency of the court were overruled.

At the trial, Henry was found guilty of embezzlement under the 96th Article of War and sentenced "to be dismissed from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for three (3) years."

The evidence shows at most that the silver sliced from the bullion bars was used for insignia and trinkets by the men in the company, and such a sentence imposed upon Henry merely because he was the commanding officer, seems outrageously harsh.

It must be remembered that no member of the J.A.G.D. or lawyer sat on the general court martial. When the case was reviewed by the Judge Advocate General's reviewing board, it unanimously held that the evidence would not support a charge of embezzlement. Two of the three reviewing judges held it was fraudulent conversion. One judge dissented, holding Henry should have been acquitted and the Judge Advocate General recommended only a six months' sentence. The Secretary of the Army approved the conviction with the sentence reduced to one year, but forfeiture of pay and dismissal from the service were confirmed.

Pending the review, Henry was detained in Europe, and finally on February 14, 1948 returned to the United States and was confined at Fort Jay, New York. A writ of habeas corpus was obtained and a hearing held in the Southern District of New York. On March 31, 1948, three days before Henry's release from confinement was scheduled, he was released on the writ of habeas corpus.

District Judge Sylvester Ryan held that by the appointment of Captain Meyers as investigating officer when he had acted as a police officer previously, violated the provisions of Article of War 70 (Title 10, U.S.C., Section 1542). He summarized his finding (76 Fed. Supp. 968, 972):

> "It cannot fairly be said that an accused has suffered an injury without harm and that a purely technical wrong has been committed, which does not harm, when the one who is in fact the accuser is appointed to conduct a thorough and impartial investigation. Especially is this not so, when the accuser functions, not only as the investigator, but later appears on the trial as a witness for the prosecution and gives material, vital and damaging testimony concerning the accused and evidence of an admission allegedly made by the accused to him. Nor, are we inclined to think that no injury was done the petitioner by the appointment of his accuser as the pre-trial investigator, because of the fact that there appears from a reading of the cold record of the trial sufficient testimony, if believed, to establish the guilt of the petitioner beyond a reasonable doubt.
>
> The pre-trial investigation prescribed by Article of War 70 was intended not only to prevent unnecessary trials of charges founded upon insufficient evidence and to afford protection to an accused

from such charges, but also to grant to him, restricted as he is by his military service, an opportunity of probing into the facts of the charge and to uncover evidence, if available, which might lead to his ultimate exculpation, both by direct evidence and testimony of witnesses who could give affirmative proof as to his innocence, as well as testimony which might affect the credibility of the witnesses upon whom the prosecution depended to establish proof of guilt.

In civil cases, criminal prosecutions are generally instituted as the result of police investigation which is followed by an arrest. This, in most instances, is followed by a hearing before a committing magistrate who holds or discharges the accused; if he holds him for action by a Grand Jury the facts are presented to this body. All of this results in either the exoneration of the accused or in the presentation of a true bill against him followed by a trial before a court and petit jury. The functions of the investigating officer, as contemplated by Article of War 70, are those ordinarily performed both by the civil prosecuting officer and the grand jury. These functions are described in *The Soldier and the Law* by McComsey and Edwards (at p. 155) as being 'similar in many respects to a grand jury investigation in which the grand jury determines whether a man is to be tried.' Surely it would be a travesty of justice to have the complainant accuser sit on a grand jury, testify before it as a witness in support of the complaint and then vote for and return a true bill. The duties performed by the investigatig officer are highly important to the accused. He must be strictly impartial, since he represents both the accused and the prosecution. It is his obligation to gather and record facts which would be admissible evidence in the court-martial trial and to do

this he must investigate. It is upon his recommendation that the commanding officer relies in determining whether there is to be a trial at all, and, if so, for what offense and by what type of court. Can it be fairly said that one who assumes the duties of an investigator is not disqualified by reason of the fact that he has previously expressed in a written report his opinion as to the guilt of the accused, when such report has been made the basis of the very charge he is investigating? Can it be argued that one who is to give testimony on behalf of the prosecution (and who subsequently does so as to the alleged admissions of the accused) has an open mind on the matter, so that his efforts will be directed along investigational channels which might lead as well to the acquittal of the accused as to his condemnation? Can we reasonably hope that such investigator will pursue interrogation and examination of proposed witnesses with the same zealous and unbiased effort as one who has had no previous contact with the case? The answer to these questions is obvious. It is manifestly impossible for him to conduct the thorough and impartial investigation contemplated and directed by Act of Congress.

Nor can we brush these objections aside with the comment that no matter who might have been appointed to investigate the result would have been the same. We do not know this to be so. Experience teaches us that many a man first suspected of being guilty of a crime is proved entirely innocent after a painstaking and impartial investigation. We cannot conclude that such might not have been the case here; but even if we could, the accused was entitled, as a matter of law, to a thorough and impartial investigation, and this was denied him when Captain M. was appointed the investigating officer."

The Court of Appeals for the Second Circuit, while assuming Article of War 70 was mandatory, brushed aside this finding by saying that "there is not a syllable to support the conclusion that in this case Captain Meyers was unwilling to reconsider the conclusions to which he had come before." That, of course, we submit assumes that a partial investigator can make an impartial investigation.

We shall show that the answer is that since Captain Meyers could not under the provisions pertaining to general courts martial have sat on the general court martial that tried Henry, consequently he was disqualified to make the thorough and impartial investigation required under Article of War 70 (Title 10, U.S.C., Section 1542).

The record, therefore, raises two purely legal questions. Was Captain Meyers, who acted as a police investigator, and who had expressed a written opinion as to Henry's guilt, competent to act as investigator under the provisions of Article of War 70? Was the court properly constituted when two members of the J.A.G.D. were available, but neither was appointed as law member?

We concede that the federal courts have no general supervisory or corrective powers over court martial proceedings, but upon habeas corpus the federal court can determine whether the court martial had jurisdiction to place Henry on trial. Both of the questions presented, go entirely to jurisdictional questions—did the general court martial have jurisdiction to place Henry on trial, and was the general court martial legally and properly constituted?

Reasons Relied on for Allowance of Writ

1. The issues involved in this matter go to the very heart of general court martial procedure and are of great general public importance, because they involve matters of due process of law in military courts.

2. The decision of the Court of Appeals for the Second Circuit upon the interpretation of Article of War 70 is in direct conflict with *Smith* v. *Hiatt,* 170 Fed. (2nd) 61 decided by the Third Circuit, now styled, *Humphrey* v. *Smith,* certiorari granted, 17 U. S. Law Week. 3236, case No. 457. It is contrary to the decision in *Anthony* v. *Hunter,* 71 Fed. Supp. 823 (D. C. Kansas) and does not give effect to the rule in *Reilly* v. *Pescor,* 156 Fed. (2nd) (C.C.A. 8) or *Hicks* v. *Hiatt,* 64 Fed. Supp. 238 (M. D. Pa.).

3. On the finding that Article of War 8 is directory and not mandatory the decision is directly opposed to the ruling in *Brown* v. *Hiatt,* Fed. Supp. (N. D. Ga.) (17 U. S. Law Week. 2247); and statements published in an authoritative book by Colonel Frederick Bernays Wiener, who argued this case for the Government in the court below.

4. With such conflicts, no army officer could possibly proceed correctly with a general court martial, and the correctness of the decision of a Judge Advocate would depend upon the Circuit Court reports that he read, rather than on any general law.

5. In *Smith* v. *Hiatt,* 170 Fed. (2nd) 61, *supra,* Lieutenant Todd as a police officer merely assisted in helping the British police. He never expressed any opinion of guilt as did Captain Meyers in this case. Yet Lieutenant Todd was held to be disqualified to make a thorough and

impartial investigation. Certainly, if Todd was disqualified, there cannot be the slightest reason for Captain Meyers being declared qualified. The question presented is whether a partial and biased person can make an impartial investigation.

6. For years it has been held that a civil court will not review the evidence in a general court martial, but it will determine whether the general court martial had jurisdiction to try the accused. The effect of the decision of the Court of Appeals is to pass over the question of jurisdiction and compel the petitioner to show that he was substantially prejudiced from a reading of the entire record. Such a rule would open the door to an unlimited number of writs being filed. The district courts would be required to review the evidence to ascertain whether "the cumulation of incidents in a trial persuasively shows that the accused has been denied a fair trial."

7. The petitioner was ordered to be confined in Fort Hancock, New Jersey, which is in the Third Circuit. While awaiting transfer the writ of habeas corpus was issued, and the trial held in the Second Circuit. Had he gone on to Fort Hancock in the Third Circuit, under *Smith* v. *Hiatt*, 170 Fed. (2nd) 61 (C.C.A. 3), *supra*, he would have been released. His entire future, that is going through life after honorable service, with a dismissal without honor, should not hinge upon the fact that the writ was served at Fort Jay and not at Fort Hancock. Justice should not depend upon such a fortuitous circumstance.

8. The protests over the general court martial trials in the army during both World Wars I and II have led to many amendments. Article of War 70 remains the same, and if this decision is upheld, the section becomes nuga-

tory. The most biased and prejudiced person can be appointed investigating officer and there will be no recourse for the accused.

9. Petitioner further represents that by order of the Court of Appeals of the Second Circuit the execution of judgment dismissing the writ of habeas corpus was stayed until the time has expired within which the petitioner may apply for a writ of certiorari. Petitioner has but three days to serve on his sentence, but his illegal confinement carries with it not only his custody and confinement but has a bearing on the illegal sentence, which carries with it forfeiture of pay and dismissal without honor from the service. In order to review the legality of the sentence under which he was placed in custody it is necessary that there be a stay of the execution of the judgment of the Court of Appeals for the Second Circuit pending final determination.

CONCLUSIONS

Since all the facts pertinent to the determination of this case by both the District Court and Circuit Court of Appeals were presented on an agreed record, the facts are undisputed and the petition presents only questions of law.

It is submitted that on this record the petition for a writ of certiorari should be granted, and that execution of the judgment of the Court of Appeals be stayed pending final determination of the cause.

Respectfully submitted,

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BRIEF IN SUPPORT OF THE PETITION

Opinions Below

The opinions have been referred to in the petition for writ of certiorari under the same caption. The District Court opinion, *Henry* v. *Hodges*, 76 Fed. Supp. 968, and in the Court of Appeals, *Henry* v. *Hodges*, 171 Fed. (2nd) 401 (17 U. S. Law Week. 2258). Both are in the record.

Jurisdiction

The statement as to jurisdiction has been set forth in the petition for writ of certiorari.

Specifications of Error

1. The Court of Appeals for the Second Circuit erred in reversing the District Court for the Southern District of New York, and dismissing the writ of habeas corpus.

2. The Court of Appeals for the Second Circuit erred in holding that the provisions of Article of War 70 (Title 10, U.S.C., Section 1542) were substantially complied with by the general court martial held at Regensberg, Germany in June 1947.

3. The Court of Appeals for the Second Circuit erred in holding that Captain Ira Meyers was qualified to make the thorough and impartial pre-trial investigation required by Article of War 70.

4. The trial court and Court of Appeals erred in holding that Article of War 8 (Title 10, U.S.C., Section 1479) was directory or discretionary and not mandatory.

5. The trial court and the Court of Appeals erred in not holding that the general court martial was not properly constituted under the provisions of Article of War 8.

6. The Court of Appeals for the Second Circuit erred in not granting the writ of habeas corpus, and in not discharging petitioner from custody.

Statement of Facts

Petitioner relies upon the facts in the Summary Statement, and they will not be restated in this brief except to the extent necessary to the argument on law.

ARGUMENT

I

Article of War 70 is jurisdictional, and was not substantially complied with by the general court martial.

A

Upon at least a half dozen occasions the Government and the Army have attempted to argue in the court that the provision in Article of War 70 (Title 10, U.S.C., Section 1542) requiring a pre-trial investigation of charges was merely directory and not mandatory.

The language of the article that "no charge will be referred to a general court martial until after a thorough and impartial investigation" is certainly mandatory in tone. From the time of the adoption of the amendment in 1920, up until 1943, the Judge Advocate General and the army considered the provision jurisdictional and mandatory.

In the *Digest of Opinions of the Judge Advocate General* (1912-1940) on page 292 we find:

> "A record of trial showed affirmatively that no investigation had been made prior to the trial.

> Held the provisions of Article of War 70 with reference to investigating charges are mandatory, *and there must be a substantial compliance therewith before charges can legally be referred to trial. A court martial is without jurisdiction* to try an accused upon charges referred to it for trial *without having been first investigated in substantial compliance* with the provisions of Article of War 70, and in such a case the court martial proceedings are *void ab initio.*" (Italics ours.)

So in the army for a period of twenty-three years the rule was that the provisions of Article of War 70 were mandatory; that there must be substantial compliance with them, and, if not, the proceedings were void *ab initio.* However, in 1943 and subsequently, the Judge Advocate General held that the provision was merely directory and not mandatory, and conferred upon an accused no rights, the deprivation of which affected the jurisdiction of the court. *In re Floyd,* 17 Board of Review Office J.A.G. 149; *Ruckman,* 72 Board of Review J.A.G. 267; *Hawkins,* 13 Board of Review J.A.G. (E.T.O.) 57; *Warnock,* 17 Board of Review J.A.G. (E.T.O.) 163.

However, when the matter came before the courts they held in every case that there must be a substantial compliance with Article of War 70, and to that extent the provisions for a pre-trial investigation of charges are mandatory. *Anthony* v. *Hunter,* 71 Fed. Supp. 823 (D. C. Kansas); *Hicks* v. *Hiatt,* 64 Fed. Supp. 238 (M. D. Pa.); *Reilly* v. *Pescor,* 156 Fed. (2nd) 632 (C.C.A. 8), certiorari denied 329 U. S. 790; *Smith* v. *Hiatt,* 170 Fed. (2nd) 61 (C.C.A. 3), now styled *Humphrey* v. *Smith,* certiorari granted, 17 U. S. Law Week. 3236, Case No. 457.

This is in line with the general rule of court, following the long administrative interpretation by the Judge

Advocate General that it was mandatory. Even though the Judge Advocate General changed his mind after twenty-three years, since the statute was not changed one iota, his first interpretation for a long time must be given great weight. *Federal Trade Commission* v. *Bunte,* 312 U. S. 349, dissenting opinion Frank J., in *U. S. ex rel. Hirshberg* v. *Malanaphy,* 168 Fed. (2nd) 503 (C.C.A. 2).

There have been instances where the courts in holding the section was mandatory, nevertheless held that there had been a substantial compliance with the section, and dismissed writs of habeas corpus. Typical of these is *Benjamin* v. *Hunter,* 169 Fed. (2nd) 512 (C.C.A. 10). However, in that case, the court very clearly set forth the rule as to the construction of Article of War 70 on page 513:

> "Taking into consideration the plain language and the intended purpose of the Article, it is clear that a preliminary investigation in substantial compliance with its requirement is essential to a valid conviction and sentence by a court martial."

We accept this as the proper interpretation of Article of War 70—that there must be substantial compliance with the provisions relating to a pre-trial investigation of charge, and failure to do so renders the conviction void *ab initio.*

There is good reason for such a rule when the purpose of the provision is studied. After World War I, there was much criticism of general court martial proceedings, and frequently in civil life lawyers and laymen would refer to some unjust and arbitrary action by saying, "What do you think this is, a court martial?"

Article of War 70 was adopted to alleviate some of this criticism and to give the accused some rights at the trial.

The Court of Appeals for the Second Circuit in its decision in this case almost entirely evaded this question by saying at page 198 of the opinion:

> "We shall not decide whether the 'thorough and impartial investigation' prescribed by the Seventieth Article of War, is a condition upon the jurisdiction of a 'general court martial' such that its absence is a defect of jurisdiction, which exposes a subsequent conviction by the court to attack by habeas corpus. A majority of the Third Circuit has recently so held, and we shall assume arguendo that they were right. What we do decide is that, when the accused has had the substance of that protection which the statute intended him to have, formal defects do not touch the jurisdiction of the court."

The court then proceeds in effect to hold that a partial and biased officer, who had expressed an opinion in writing that the accused was guilty, could function as a pre-trial investigator under the provisions of Article of War 70. This was not a mere formal defect of procedure, but affected substantial rights guaranteed to the accused by the Articles of War enacted by Congress.

The idea that a partial and biased investigator could make a "thorough and impartial" investigation was not a mere irregularity as intimated by the Court of Appeals of the Second Circuit, but rather as the District Court held a "total failure to comply with the mandatory provisions of Article of War 70" which guaranteed the accused certain rights.

We, therefore, believe that this court, as all other courts, will hold that the pre-trial investigation procedure of Article of War 70 is mandatory and jurisdictional, and that its provisions must be complied with substantially. This we say on the undisputed record was not done as a matter of law.

B

The significant portion of Article of War 70 (Title 10, U.S.C., Section 1542) reads:

> "Charges; Action Upon.—Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief. *No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made.* This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides." (Italics ours.)

This article provides certain steps to be taken. Charges are to be filed under oath that the person signing them has personal knowledge or has investigated this matter. In this case, the record shows Lieutenant Colonel Hastings who signed the charges did not have personal knowledge but relied upon the investigation made by Captain Ira Meyers and reported on October 10, 1946. After the charges are filed, the Article requires a thorough and impartial investigation to be made, and for that purpose an investigating officer is appointed.

Now just what is the purpose of the pre-trial investigation? It is best described by Lieutenant Colonel Frederick Bernays Wiener, who argued the case for the Government in the court below, in his book entitled *"Military Justice for the Field Soldier"* at page 13:

> "25. When and why investigation is necessary.—First, why investigate charges at all? Isn't it enough to rely on the charges made by the accuser, who must make them under oath, and let the court-martial proceed to sift out the truth? The experience of our Army in the First World War answered this question with a resounding No. Without proper investigation, many cases were referred to trial by general court-martial which could have been adequately disposed of by inferior courts, and a good many more cases were referred for trial which should never have been tried at all. The requirements for investigation of charges contained in AW 70 were incorporated into the 1920 amendments to the Articles of War as a direct consequence of this experience. Even before that time they had been prescribed by the War Department in the form of changes to the 1917 Manual for Courts-Martial."

The purpose of the adoption of the article was therefore to have a proper investigation to sift out cases which should never be referred for trial, and those which should be. The purpose of and manner in which the investigation should be conducted is clearly set forth in the War Department Manual, *T.M. 27-255 "Military Justice Procedure"* in Section 41:

> "The purpose of the formal investigation required by A. W. 70 is to inquire into the truth of the matter set forth in the charges, the form of

> charges, and what disposition should be made of the case. It is not the investigator's function to build up a case against the accused, but to ascertain and *impartially* weigh all facts in arriving at his final conclusion."

The investigator must be in a position to weigh all facts impartially. The investigating procedure is best described in a book used widely in World War II styled *"The Soldier and the Law"* (McComsey and Edwards at page 155):

> "It is similar in many respects to a grand jury investigation, in which the grand jury determines whether a man should be tried."

Without an express waiver, no man can be tried in a criminal case without an indictment by a grand jury. This court would hardly say that it was due process if the preliminary hearing was held before a magistrate or one man grand jury, who had been the chief police investigator in accusing a defendant or an accused. Captain Meyers was not assigned to make a report on the missing silver in a judicial capacity, but rather as a chief of police would assign his prize detective or the federal agents might designate an F.B.I. man to investigate and bring in the culprit. This function Captain Meyers performed, and concluded in his report of October 10, 1946 (Exhibit 14 Court Martial Proceedings) by saying that "Captain Henry appears to be the main figure in the affair." Based on this report the commanding officer on October 25, 1946 filed charges against Henry.

Up to this time, no error had intervened of which Henry could complain. However, as clearly set out in Article of War 70 it was the duty of the commanding officer to have

a "thorough and impartial" investigation made. We submit that the commanding officer who filed the charges might just as well have appointed himself as Captain Meyers, who made the report accusing Henry, and upon which the charges were filed.

We submit that as a matter of law, Captain Meyers was disqualified to serve under Article of War 70 as investigating officer. The District Court was right in stating that Captain Meyers was "the one who was in fact the accuser."

After the charges were filed under the provisions of Section 58e of the Army *Manual of Courts Martial* Captain Meyers could not have been appointed to the General Court Martial as he had expressed an opinion on the guilt of the accused. That section reads:

> "e. Challenge for cause.—Grounds for—Third: That he is the accuser as to any offense charged. Sixth: That *he personally investigated an offense* charged as member of a court of inquiry or otherwise. Seventh: That *he has formed or expressed a positive and definite opinion* as to the guilt or innocence of the accused as to any offense charged."

Therefore, had Captain Meyers been appointed to the general court martial, Henry could have successfully challenged him for cause.

This the Court of Appeals did not consider. In fact, the court misconceived the entire purpose of Article of War 70. In its opinion the court compared the functions performed by Captain Meyers both in his detective work and that as investigating officer under Article of War 70 with that of a judicial officer. Said the court at page 199:

> "There is no inherent reason to deny power to a judicial officer to review his own judgments, even

> though they be final and decide the very merits of the cause; at common law this was permissible. True, it *has long been the custom to forbid it by statute* and there are good grounds for so doing; but it still persists in the practice of bringing on a motion for a new trial for errors of law before the judge who made the original decision. Rightly or wrongly, judges are credited *pro tanto* with enough detachment to be able to re-examine impartially what they have done; at least when, as here, the final disposition will in the end be determined by others." (Italics ours.)

There are only five things wrong with this analogy. First, of all Captain Meyers was neither a judge nor even a lawyer, but just an ordinary army officer acting under orders from his commanding officer. Secondly, when Captain Meyers made his investigation in September 1946, he was not acting as a judicial officer, but as a detective or police officer attempting to solve a violation of military law. Third, when acting as an investigating officer under Article of War 70 he was acting in a judicial capacity to review his work as a detective or police investigator. Fourth, there was a specific statute, Article of War 70, that precluded Captain Meyers from acting as investigator under that statute. The Article provided the investigation should be "thorough and impartial." Certainly under our legal system a biased and prejudiced person, who had expressed an opinion of the guilt of the accused, could hardly make an impartial investigation. Fifth, the *Manual of Courts Martial* (Section 58e) precluded Captain Meyers from sitting on the general court martial that tried Captain Henry, because he had expressed an opinion. After the expression of the opinion of guilt by Captain Meyers he could not be considered impartial, but definitely biased and prejudiced.

Our contention, which is sound, is that Captain Meyers actually served first as a police officer, then in a judicial capacity after he had prejudged the matter. The lower court overlooked the approach to a case of this type taken by Chief Justice Taft in *Tumey* v. *Ohio,* 273 U. S. 510, 535:

> "The plea was not guilty, and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge."

So Henry was entitled in Article of War 70 to have a "thorough and impartial" investigation before charges were referred to a general court martial. He was entitled to have some one fair and impartial to make the investigation, and not a police officer who in a written report had accused the petitioner of theft. As District Judge Ryan said on page 974:

> "Experience teaches us that many a man first suspected of being guilty of a crime is proved entirely innocent after a painstaking and impartial investigation. We cannot conclude that such might not have been the case here; but even if we could, the accused was entitled, as a matter of law, to a thorough and impartial investigation, and this was denied him when Captain Meyers was appointed the investigating officer."

This has always been the law in civil tribunals. In *Moore* v. *State,* 118 Ohio State 487, the court held in the syllabus of the case, which is written by the court, and states the legal proposition:

> "A defendant in a criminal proceeding is entitled to have the case heard and determined by an impartial tribunal, and where the defendant is not

> entitled to demand a jury and the judge or magistrate is the trier of the facts and it is claimed that the judge has predetermined the fact of guilt, and that the defendant will be unable to secure a fair trial for that reason, and asks that the cause be removed to some other court of competent concurrent jurisdiction and offers to introduce evidence in support of the request for removal, which is refused, and the cause proceeds to judgment of conviction and sentence, such refusal to hear evidence is a denial of due process of law."

The District Court made a finding of fact that Captain Meyers was partial, not impartial, and therefore disqualified to act as investigating officer under Article of War 70. This was the finding of fact which was made in the opinion of the court, and which was entitled to some credence under the Rules of Federal Procedure, Rule 52 (a) as amended effective March 19, 1948. Under that Rule and Rule 81 (a) (2) the Court of Appeals should not have disturbed that finding unless clearly erroneous. See *Farrell* v. *Lanagan,* 166 Fed. (2nd) 845 (C.C.A. 1); *Willis* v. *Hunter,* 166 Fed. (2nd) 721 (C.C.A. 10).

The court disregarding this finding held that Henry had "assented to the 'post-charges' investigation without reserve." This is because the record showed that when Captain Meyers asked, "Henry whether he wished to make any further statement of his own, and Henry said that he did not."

Of course, this was not a waiver. Henry was not a lawyer, and he was not represented by counsel. In fact, he had no right to have counsel, and had to submit to the investigation by Captain Meyers. There is no provision for challenging an investigating officer by the accused at that time.

On the other hand, as soon as Henry obtained counsel, the counsel protested to the military authorities against the improper investigation. That was as early as December 1946, six months before the trial was held, and yet nothing was done to correct the situation by the military authorities.

In concluding this portion of the brief, it is admitted that Captain Meyers made a survey investigation in September 1946 in which he accused Henry of theft. Upon his report the charges were filed against Henry. Captain Meyers was disqualified by reason of his expression of Henry's guilt, and active participation in the police investigation, to serve as investigation officer under Article of War 70. Henry did not receive a thorough and impartial investigation of the charges filed against him, which was a condition precedent to reference of the charges to a general court martial. The court martial proceedings were, therefore, *void ab initio*.

II

Article of War 8 is mandatory and the general court martial which tried the petitioner was not properly constituted.

Article of War 8 (Title 10, U.S.C., Section 1479) provides:

> "The authority appointing a general court martial shall detail as one of the members thereof *a law member, who shall be an officer of the Judge Advocate General's Department,* except that when an officer of that department is not available for the purpose, the appointing officer shall detail instead an officer of some other branch of the service

> selected by the appointing authority as especially qualified to perform the duties of the law member." (Italics ours.)

The undisputed evidence from the record shows that there were at least two members of the Judge Advocate General's Department available to act as law member, but neither was appointed to the general court martial. In fact there were no lawyers or members of the Judge Advocate General's Department on the general court martial. Colonel Clarence K. Darling, a Cavalry Officer, was designated and served both as president and law member of the court. (*Court Martial Proceedings* page 11.)

The challenge of counsel to the constituency of the court was overruled before trial so that the question of the constituency of the court was properly before the District court and the Court of Appeals.

Petitioner will concede that the Judge Advocate General and the army have always construed Article of War 8 to be directory and not mandatory. We shall show that this construction would render the entire article nugatory, and would permit commanding officers to disregard it at will. For example, there might be 100 members of the Judge Advocate General's Department available, but if the article is directory only, the commanding officer need appoint none of them.

In a recent article by Leonard M. Wallstein, Jr. on "*Revision of the Army Court Martial System*" in the March 1948 issue of the *Columbis Law Review* (Vol. 48, page 255) after quoting Article of War 8 the author says:

> "The mandatory language leaves little doubt that Congress intended that normally a lawyer of the

> Judge Advocate General's Department should sit as a law member, and that on the occasion when such an officer was not available a lawyer from another branch should serve instead. But such was not the interpretation in practice."

The reason for the constant misinterpretation of Article of War 8 by the army, was that the entire articles were not read with the purpose that Congress had in mind. The language of Article of War 8 is mandatory. This is shown clearly when this sentence in Article of War 18 (Title 10, U.S.C., Section 1489) is read:

> "Each side shall be entitled to one peremptory challenge; *but the law member of the court shall not be challenged except for cause.*" (Italics ours.)

The law member was not subject to a peremptory challenge, but only for cause, because Congress wanted someone to sit on the court martial who knew legal procedure. In this case Colonel Darling was both president and law member of the court. Henry was powerless to challenge Colonel Darling peremptorily.

The effect of Article of War 18 makes it conclusive that Congress intended that a law member should sit on the court, who was a member of Judge Advocate General's Department. It never intended that Article of War 8 could be disregarded at the will of the commanding officer.

Before World War II military authorities felt that Article of War 8 was mandatory. While in argument in the Court of Appeals, Colonel Frederick Bernays Wiener ardently insisted the provisions of Article of War 8 were only directory, that is not the position he took in 1940. In that year in his book "*A Practical Manual of Martial*

Law'', Colonel Wiener, contrasting the difference between military commissions and court martials said at pages 124-5:

> "It is likely that one of the members of a military commission would be designated as law member (A.W. 8, 31). The difference would be that whereas in the case of a trial by general court martial, *these matters being statutory would be mandatory,* so that their omissions would nullify the trial, in the case of a military commission any such deviation would not have that effect, except possibly where the Articles of War were specifically applicable to military commissions." (Italics ours.)

Aside from this case, the question of whether Article of War 8 is mandatory or directory has only been before the courts on one other occasion. In *Brown* v. *Hiatt,* Fed. Supp. (17 U. S. Law Week. 2274) decided November 17, 1948 the District Court of the Northern District of Georgia held that the provisions of Article of War 8 were mandatory holding that where a member of the Judge Advocate General's Department was available he must be appointed as the law member. Failure to so appoint was held to be jurisdictional, and entitled the accused after conviction for murder to be discharged from custody on a writ of habeas corpus. In the opinion the court said:

> "Congress evidently felt, especially in serious cases like the present one, that it was necessary for the protection of the accused and also of the public interest, that a lawyer, with the experience derived from service in the Judge Advocate General's Department, should sit in every court-martial case and expressly made this a condition precedent to the validity of such court-martial, except in the single instance where such officer was not available. No discretion whatever was given the appointing

> authority where such an officer was available. Where, as here, the record shows that such officer was not only available but was actually appointed, to another position on the court, and no reason whatever is shown by the record or extrinsic evidence why he was not detailed as the law member, there is a direct violation of one of the most important requirements of the law for the establishment of a legal court-martial. Since the law requires that jurisdictional facts must affirmatively appear, either by the order establishing the court, or by extrinsic evidence in order to establish the jurisdiction of the court-martial, the burden of proving such facts rests upon the party asserting the existence of such necessary jurisdictional facts."

The only difference between the case of *Brown* v. *Hiatt* and this case is that there was but one officer available in that case, but in this case two were available.

The Court of Appeals for the Second Circuit in its decision attempts to make a specious distinction between available and accessible. However, the court, directly contrary to *Brown* v. *Hiatt* held the article purely directory in these words at page 202:

> "We cannot say that it was not more in the interest of justice to detail Beatty to defend Felman than to put him on the court; or that it was not better judgment to make Swan a prosecutor than a judge; and these were the only officers of the Department whom Henry claims to have been 'available'. The whole question is especially one of discretion;"

In *Runkle* v. *United States*, 122 U. S. 543, 546 this court expressly held that "it must appear affirmatively and unequivocally that the court was legally constituted." In *McLaughry* v. *Deming*, 186 U. S. 49, 63 it was held that under the law during the Civil War a volunteer

could be tried by a court martial consisting of volunteers. Deming, a volunteer was accused and tried before a general court martial consisting of regular army officers. After conviction, Deming was released on a writ of habeas corpus on the ground that the court martial was not properly constituted. We quote from the opinion of Justice Peckham at page 63:

> "A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev. S. 470; *Brooks* v. *Adams*, 11 Pick, 441, 442; *Mills* v. *Martin*, 19 Johns., 7, 30; *Duffield* v. *Smith*, 3 Serg. & R. 590, 599. Such, also, is the effect of the decision of this court in *Wise* v. *Withers*, 3 Cranch. 331, 2 L. Ed. 457, which according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, 209, 7 L. Ed. 650, 655, ranked a court martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes* v. *Hoover*, 20 How. 65, 80, 15 L. Ed. 838, 844; *Mills* v. *Martin*, 19 Johns., 33. There are no presumptions in its favor, so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in *Brown* v. *Keene*, 8 Pet. 112, 115, 8 L. Ed. 885, 886, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive,—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient

> that jurisdiction may be inferred, argumentatively, from its averments. All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively."

Under this ruling it would clearly appear that the decision in *Brown* v. *Hiatt,* Fed. Supp. (17 U. S. Law Week. 2247) was right, and that the Court of Appeals for the Second Circuit was wrong.

The court martial that tried Henry at Regensberg, Germany, did not have a member of the Judge Advocate General's Department when two such officers were available. It was, therefore, not properly constituted, and the conviction of the petitioner, Henry, was void.

CONCLUSION

We submit that on a review of this case, the Court of Appeals for the Second Circuit erred in reversing the District Court of the Southern District of New York, and that the writ of habeas corpus should have been granted. We respectfully submit this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

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CITATIONS.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 598

FREDERIC HENRY, *Petitioner*

v.

GENERAL COURTNEY H. HODGES, Commanding General, First Army, Fort Jay, New York

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On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MEMORANDUM FOR THE RESPONDENT.

OPINIONS BELOW

The opinion of the District Court (R. 18-39) is reported at 76 F. Supp. 968. The opinion of the Court of Appeals (R. 47-51) is reported at 171 F. 2d 401.

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1948 (R. 51), and a petition

for rehearing (R. 53-71) was denied on December 16, 1948 (R. 72). The petition for a writ of certiorari was filed on February 25, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Following an investigation of an alleged misappropriation of silver bullion, conducted on orders of superior authority, an officer filed a report in which he stated that petitioner appeared to be the principal guilty party. Formal charges were thereafter preferred against the petitioner accusing him of embezzling the silver. The first question presented is whether the officer who conducted the preliminary investigation and filed the report was ineligible, due to lack of impartiality, to conduct the "thorough and impartial" investigation of these charges which the second paragraph of Article of War 70[1] directs shall be made before such charges may be referred to a general court-martial for trial.

2. Whether, assuming such ineligibility and consequent failure to comply substantially with this provision of AW 70, the failure to comply was a fatal jurisdictional error which invalidated the subsequent court-martial trial and conviction.

3. Whether the determination by the military authority appointing a general court-martial, in

[1] Now AW 46b. See footnote 2, *infra*.

detailing as law member thereof an officer not in the Judge Advocate General's Department, that an officer of that Department was "not available for the purpose" within Article of War 8, is subject to collateral attack on habeas corpus.

STATUTES INVOLVED

The second paragraph of the 70th Article of War (10 U.S.C., 1946 ed., 1542) provided at all times relevant hereto as follows:[2]

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

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[2] This paragraph has, as of February 1, 1949, been amended and renumbered as AW 46b. Act of June 24, 1948, c. 625 (Public Law 759, 80th Cong.), Title II, §§ 222, 231, 244. Inasmuch as the paragraph is referred to throughout the record as being part of "AW 70," we shall continue to refer to it as AW 70.

The second paragraph of the 8th Article of War (10 U.S.C., 1946 ed., 1479) provided at all times relevant hereto as follows:

> The authority appointing a general court martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe.

STATEMENT

On June 4, 1947, petitioner, a captain in the United States Army, was convicted in Germany by an Army general court-martial of embezzling silver bullion, in violation of the 93d Article of War (10 U.S.C., 1946 ed., 1565), and was sentenced to dismissal from the service, total forfeitures, and three years' confinement at hard labor (CM R. 109, 257, 263, 264).[3] After review of the record by the Staff Judge Advocate (CM R. 25-30;

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[3] "CM R." refers herein to the court-martial record which was admitted in evidence at the habeas corpus proceeding pursuant to stipulation (R. 17, 44). Page references to this record are to the pencilled numbering at the lower right-hand corner of each page. Photostatic copies of the court-martial record have been filed with the Clerk of this Court.

see AW 46 (10 U.S.C., 1946 ed., 1517)), the convening authority approved the sentence and forwarded it for confirmation (CM R. 265).

Thereafter, pursuant to AW 50½ (10 U.S.C., 1946 ed., 1522), the record was reexamined by a Board of Review in the Judge Advocate General's Office. The Board rendered an opinion (CM R. 3-16) holding that the evidence was insufficient to establish that the accused had been entrusted with the silver, or had any appreciable degree of responsibility for or control over it, and that, accordingly, he was not on the evidence of record guilty of embezzlement. The Board therefore held that "the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as include findings of guilty of fraudulent conversion to accused's own use * * *, in violation of the 96th Article of War," and legally sufficient to support the sentence (CM R. 16).[4]

The Judge Advocate General concurred in the holding of the Board of Review, and recommended that the period of confinement be reduced to six months, but that otherwise the sentence be confirmed (CM R. 1-2). On December 18, 1947, the Secretary of the Army, acting under AW 48 (10

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[4] One member of the Board of Review dissented on the ground that, in his opinion, fraudulent conversion is not a lesser offense included within the charge of embezzlement (CM R. 17-18).

U.S.C., 1946 ed., 1519) and Executive Order No. 9556 of May 26, 1945 (10 F.R. 6151), approved only so much of the findings as had been held legally sufficient, reduced the period of confinement to one year, confirmed the sentence as thus reduced, and designated a branch of the United States Disciplinary Barracks as the place of confinement (CM R. 19-20).

On February 19, 1948, petitioner filed in the District Court for the Southern District of New York a petition for a writ of habeas corpus (R. 5-9), which gave rise to the present proceeding. The petition challenged the jurisdiction of the court-martial on two separate grounds. The first ground was that AW 70, paragraph 2 (*supra,* p. 3), providing that "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made," had not been complied with, in that Captain Meyers, the pre-trial investigating officer, had, prior to his appointment as such officer, "made a special investigation and report to the Commanding Officer of the 3rd Military Government Regiment in which he reported that your petitioner was the main figure in taking silver, and it was upon this report of Capt. Ira R. Meyers that charges were filed against your petitioner," and that consequently Captain Meyers "was prejudiced and was unable to make a fair and impartial" investigation as required by AW 70, paragraph 2

(R. 7).[5] The second ground was that AW 8, paragraph 2 (*supra*, p. 4), had not been complied with, in that the law member of the court-martial was not an officer of the Judge Advocate General's Department, although, allegedly, "at least two members of the Judge Advocate General's Department were available" for appointment to the court as law member (R. 8).[6]

The writ issued (R. 3-4) and a return was filed (R. 10-16). By stipulation (R. 17), it was agreed that the petition for the writ, the writ, the return to the writ, and the court-martial record should constitute the entire record in the habeas corpus proceeding. On March 29 and 31, 1948, respectively, the District Court (Ryan, D. J.) entered an opinion (R. 18-39) and order (R. 40-41) sustaining the writ and directing petitioner's discharge from custody.[6a] In its opinion, the Dis-

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[5] The petition also alleged that AW 70 had been violated in that Captain Meyers, in conducting the AW 70 investigation, did not permit petitioner to call certain witnesses he desired (R. 7). This was denied by Captain Meyers during the court-martial proceedings (CM R. 120-122), however, and the court-martial specifically resolved this issue against petitioner (CM R. 127-128). The District Court declined to relitigate the issue (R. 34-36), and it was abandoned on appeal to the Court of Appeals (R. 50).

[6] Both these grounds were also urged, unsuccessfully, in the course of the court-martial proceedings in special pleas to the jurisdiction of the court (CM R. 105-108, 111-127).

[6a] Petitioner had but three days of his sentence left to serve when he was ordered discharged (R. 56, 69; Pet. 12). The order of discharge directed that petitioner be released "upon

trict Court rejected petitioner's contention that the court-martial trial and conviction were void for failure to comply with AW 8 (R. 36-38), stating that that Article "is clearly directory to the officer appointing the court" and that "Whether or not the Judge Advocate General's Department officer is available as a law member is unquestionably a matter, which lies for determination, in the sound discretion of the officer who appoints the court-martial" (R. 38). The court held, however, that compliance with AW 70 is a jurisdictional prerequisite to a valid trial and conviction by an Army general court-martial (R. 25-32) and that it had not been substantially complied with in this case (R. 22-25, 38-39).

On appeal by respondent to the Court of Appeals for the Second Circuit, the judgment of the District Court was reversed and the writ ordered dismissed (R. 51). The Court of Appeals assumed, *arguendo,* that substantial compliance with AW 70 is a jurisdictional prerequisite to a valid general court-martial trial (R. 47-48), but held that there had been substantial compliance in this case (R. 48-50). The Court of Appeals also re-

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his personal recognizance and [turned] * * * over to the custody of his attorneys * * * pending the determination of any appeal which may be taken from this order * * *" (R. 40-41). The mandate of the Court of Appeals, reversing the order of the District Court and directing dismissal of the writ of habeas corpus (R. 51), has been stayed pending disposition by this Court of the petition for a writ of certiorari (R. 72-73).

jected the contention that the court-martial was illegally constituted for failure to comply with AW 8 (R. 50-51).

The relevant facts may be summarized as follows:

With respect to AW 70.—Captain Ira Meyers had been designated by the Commanding Officer of Company D, 3d Military Government Regiment, to investigate an alleged misappropriation of silver plate by Military Government officers in Waldmunchen, Germany, in January 1946. After interviewing numerous witnesses, he submitted a report on October 10, 1946 (CM R. 38-45), to which were attached 11 enclosures and sub-enclosures (CM R. 46-80), and in which he stated, among his "Conclusions" (CM R. 43-45), that "Silver plate was illegally cut and taken in Jan 46 by several MG Officers" and that "Capt. Henry appears to be the main figure in the affair, although it is apparent that Lt. Felman shared to a great extent in the spoils" (CM R. 44).

Thereafter, on October 24, 1946, the charges on which petitioner was subsequently tried were preferred against petitioner by Lieutenant Colonel Hastings (CM R. 31-33), the Commanding Officer of Company D, who had ordered the investigation (CM R. 121, 246). Captain Meyers was detailed to investigate these charges pursuant to AW 70 by the regimental commander (CM R. 121, 123). On October 29, 1946, Meyers submitted his "Pre-

trial Investigating Officer's Report" (CM R. 35-37), in which he recommended that petitioner be tried by general court-martial. Meyers attached to his report (see CM R. 35, 37) numerous exhibits (CM R. 38-85), including, as Exhibit A (CM R. 38-45), the report of his own earlier investigation which he had conducted prior to the filing of charges. He supplemented this October 29 report with a second report, dated October 31 (CM R. 295-297).

Meyers' pre-trial investigation report was thereafter reviewed at Headquarters, 3rd Military Government Regiment (CM R. 86-87). The regimental commander also recommended trial by general court-martial (CM R. 88), as did the Staff Judge Advocate of the Commanding General, Third Army, who reviewed the charges and accompanying papers pursuant to AW 70, paragraph 3 (10 U.S.C., 1946 ed., 1542) and MCM, 1928 ed., §35*b* (CM R. 89). The charges were thereupon referred for trial by order of the Commanding General, Third Army (CM R. 33), and, in due course,[7] were referred for trial to a general court-martial appointed by the Commanding General, United States Constabulary (CM R. 96).

With respect to AW 8.—The court-martial, as originally appointed on May 16, 1947 (CM R. 96),

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[7] Trial was delayed to permit the taking of depositions (CM R. 94). In the meantime, the Third Army was returned to the United States.

included Colonel Darling, Cavalry, as president and law member, and Lieutenant Colonel Mosely, Infantry, Legal Division, OMGB, as the regularly appointed defense counsel for both petitioner and Lieutenant Felman (see p. 9, *supra*), whose common trial with petitioner had previously been authorized by the appointing authority (CM R. 266). When the court-martial first convened, on May 21, 1947, Lieutenant Colonel Mosely asked to be relieved as defense counsel, stating that he felt "morally disqualified" on the ground that, as "legal officer assigned to this detachment," he had previously recommended that charges be preferred against both accused (CM R. 93). Both accused then requested individual counsel of their own selection (see AW 17 (10 U.S.C., 1946 ed., 1488); MCM, 1928 ed., §45*a*), petitioner asking for William H. Mondell, a civilian employee of the United States, and Felman for one Captain McCleod (CM R. 94). The court-martial thereupon adjourned until a decision could be had as to the availability of the individuals requested as counsel (CM R. 95).

In an order dated the same day, May 21, the appointing authority relieved Lieutenant Colonel Mosely as defense counsel and detailed Lieutenant Colonel Beatty, Judge Advocate General's Department, as defense counsel in his stead (CM R. 97). In another order, dated May 24, the appointing authority detailed 2d Lieutenant Swan, also of the

Judge Advocate General's Department, as assistant trial judge advocate (CM R. 98).

The court-martial reconvened on May 28, 1947, Beatty and Swan being present in their respective capacities (CM R. 99). At this time, Mr. Mondell, petitioner's choice as his individual counsel, was also present and petitioner introduced him to the court (CM R. 100-101). Felman advised the court that his choice for individual counsel, Captain McCleod, was not yet present, but that for the time being he was willing to be represented only by Lieutenant Colonel Beatty, the defense counsel appointed for both accused (CM R. 101-104).

Thereupon, petitioner's individual counsel, Mondell, challenged Colonel Darling "for cause, as law member but not as president," on the ground that he was not a member of the Judge Advocate General's Department although "the appointing authority did have available to it a fully qualified member of the Judge Advocate Section [*i.e.*, Lieutenant Colonel Beatty], who was not appointed on this court originally but brought in subsequently as a substitute for the regularly appointed defense counsel" (CM R. 105). Mondell stated that his challenge of Colonel Darling had "nothing to do with Colonel Darling's qualifications as law member," but was based solely on the fact that AW 8 provided that the appointing authority should detail, as law member, an officer of the Judge Advocate General's Department if such an officer was available (*ibid.*). The prosecution

opposed the challenge on the ground that the availability or non-availability of an officer of the Judge Advocate General's Department for appointment as law member was "a matter within the discretion of the appointing authority" (CM R. 105-106). After hearing argument, the court overruled the challenge (CM R. 107-108).[8] Thereafter the same objection was raised in a special plea to the jurisdiction of the court (see MCM, 1928 ed., §§ 7, 65), and overruled (CM R. 111).

After argument on various other motions and pleas (CM R. 111-132), including a plea to the jurisdiction of the court on the ground that AW 70 had not been complied with (CM R. 111-128), petitioner entered pleas of not guilty to the charges and specifications (CM R. 132). Also, Lieutenant Colonel Beatty asked for a severance for Felman, which was granted (CM R. 134; see MCM, 1928 ed., §71*b*). The trial thereupon continued as to petitioner alone (CM R. 134-135, *et seq.*). While the court-martial record does not clearly indicate the fact, it appears that Beatty, the defense counsel appointed to represent both accused, continued to represent petitioner as co-counsel with Mondell, his specially retained counsel. See CM R. 264, where both Beatty and Mondell signed the "Authentication of Record" as "defense counsel" and "special defense counsel," respectively.

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[8] Challenges are provided for in AW 18 (10 U. S. C., 1946 ed., 1489), and the procedure in connection therewith is prescribed by MCM, 1928 ed., § 58*f*.

The court-martial's rulings on petitioner's challenge of Colonel Darling for cause and his plea to the jurisdiction of the court on the ground of failure to comply with AW 8 were held correct on review both by the Staff Judge Advocate (CM R. 28) and the Board of Review (CM R. 10-11). The petition for a writ of habeas corpus (R. 5-9) made no objection as such to any ruling by Colonel Darling as law member.

ARGUMENT

1-2. In *Smith* v. *Hiatt,* 170 F. 2d 61, now pending on writ of certiorari *sub nom. Humphrey* v. *Smith,* No. 457, the Court of Appeals for the Third Circuit held that substantial compliance with AW 70 is a jurisdictional prerequisite to a valid trial and conviction by general court-martial, and that that Article had not been substantially complied with in that case. Three reasons were assigned why there had not been substantial compliance, the principal one being that the pre-trial investigating officer, Lieutenant Todd, was ineligible to conduct the thorough *and impartial* investigation directed by the Article because of the fact that he had previously participated to a limited extent in the preliminary investigation which led to the charges, including the conduct of an identification line-up at which the accused was identified as the guilty person.

In the instant case, the Court of Appeals for the Second Circuit held that Captain Meyers was not

precluded from conducting the impartial pre-trial investigation called for by AW 70 by reason of the fact that he had conducted the entire pre-charge investigation (*supra*, p. 9) of the offense that was subsequently charged and re-investigated pursuant to AW 70. The court below did not decide the jurisdictional question, but assumed, *arguendo*, that substantial compliance with AW 70 conditions the jurisdiction of the court-martial.

The *Smith* case, we understand, will have been argued before the Court passes upon the petition for certiorari in this case. Accordingly, we suggest that the Court reserve decision on the petition herein until the *Smith* case is decided, and then enter in this case whatever order seems appropriate in the light of that decision.

It should be observed that, in the petition for certiorari, there is neither a showing nor an attempt to show that the conduct of the AW 70 investigation by Captain Meyers "injuriously affected the substantial rights" of the petitioner. Congress has provided in AW 37 (10 U.S.C., 1946 ed, 1508):

> The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall ap-

> pear that the error complained of has injuriously affected the substantial rights of an accused * * *.

Thus, even assuming that compliance with AW 70 is a condition precedent to the jurisdiction of a general court-martial, it is clear that a court-martial is deprived of jurisdiction only where there has been such non-compliance with AW 70 as has "injuriously affected the substantial rights of an accused". Here, the petitioner, after trial and conviction by a general court-martial, only complains that if an officer other than Captain Meyers had made the AW 70 investigation he might not have recommended trial by general court-martial. This is not enough under AW 37.

3. We submit that certiorari should be denied with respect to the question raised under AW 8. The District Court rejected petitioner's contention that the general court-martial which tried him was illegally constituted because, while two officers of the Judge Advocate General's Department were physically available, an officer of another branch of the service was detailed as law member; the court held that the determination of the appointing authority as to availability was final, and not subject to review, citing *Martin* v. *Mott*, 12 Wheat. 19, 34-35 (R. 38). Petitioner renewed his contention on this point in the Court of Appeals, which upheld the District Court in this respect (R. 50-51). We submit that the determination by both courts below on this issue is correct.

The language of the statute which requires the detail of a law member, AW 8 (*supra*, p. 4), confers a broad discretion on the appointing authority. He must detail a law member—

> who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specifically qualified to perform the duties of law member. * * * .

The statute reads, "available for the purpose," not merely "available." Consequently, as the Judge Advocate General has held, AW 8 "imports not only the narrow concept of physical accessibility, but also the broader concept of discretion in the determination of the suitability of the person." CM 231963, *Hatteberg*, 13 B.R. 349, 368 (1943), summarized in 2 Bull. JAG, p. 304, §365(9); Cf. CM ETO 804, *Ogletree*, 2 B.R. (ETO) 337 (1943), summarized in 2 Bull. JAG, p. 466, §365(9); CM 209988, *Cromwell*, 9 B.R. 169, 196 (1938); see Board of Review's discussion of this point in this case, CM R. 10-11; Dig. Op. JAG (1912-1940), §365(9)(6), p. 176. The exercise of a discretion so broad in its terms, this Court has consistently held, will not be reviewed by the courts. *Martin* v. *Mott*, 12 Wheat. 19, 34-35; *Mullan* v. *United States*, 140 U.S. 240, 243-245; *Swaim* v. *United States*, 165 U.S. 553, 559-560.

In *Martin* v. *Mott, supra,* reliance was placed on AW 64 of 1806 (Act of April 10, 1806, c. 20, 2 Stat. 359, 367) which provided that:

> General courts martial may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service.

It was contended that the court-martial was not composed of the proper number of officers required by law. But the Court held, *per* Story J. (12 Wheat., at 35), "that the act is merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive."

Similarly, in *Mullan* v. *United States, supra,* the statutory provision in question was Article for the Government of the Navy 39 of 1862 (R. S. 1624), reading in pertinent part as follows:

> A general court martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court. But in no case where it can be avoided without injury to the service, shall more than one-half, exclusive of the President, be junior to the officer to be tried. * * * .

Mullan, an officer in the Navy, was tried on board a naval vessel at Hong Kong by a court-martial of seven officers, five of whom were junior to him. He established that at the time of the organization of the court-martial there were twelve more officers of higher rank than he, on waiting orders in the City of Washington, and that, at about the same time, seven officers had been sent from New York to Panama for the trial of a medical officer there, in view of the fact that in the squadron at Panama there was not the requisite number of officers of sufficient rank to organize the court for that trial.

This Court held, on the authority of *Martin* v. *Mott,* that the judgment of the appointing authority could not be collaterally attacked, saying (140 U.S., at 245):

> * * * Whether the interests of the service admitted of a postponement of his trial until a court could be organized of which at least one-half of its members, exclusive of the President, would be his seniors in rank, or whether the interests of the service required a prompt trial, upon the charges preferred, by such officers as could be then assigned to that duty by the commander-in-chief of the squadron, were matters committed by the statute to the determination of that officer. And the courts must assume—nothing to the contrary appearing upon the face of the order convening the court—that the discretion conferred upon him was properly exercised, and, therefore, that

> the trial of the appellant by a court, the majority of whom were his juniors in rank, could not be avoided "without injury to the service." "Whenever," this court said in *Martin* v. *Mott,* 12 Wheat. 19, 31, "a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

An analogous situation was presented in *Swaim* v. *United States, supra.* AW 79 of 1874 (R.S. 1342) provided that—

> Officers shall be tried only by general courts-martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank.

Swaim, a brigadier general, was tried by a court-martial composed of 11 officers, of whom 6 were only colonels, at a time when there were, exclusive of himself, nineteen general officers in the Army (28 C. Cls. 173, 184, 202); and he accordingly contended that the court-martial was illegally constituted. But this Court held that the discretion of the President, who had convened the court-martial, could not be collaterally attacked. It said (165 U.S., at 560):

> In the present case, several considerations might have determined the selection of the members of the court, such as the health of the officers within convenient distance, or the

> injury to the public interests by detaching officers from their stations. The presumption must be that the President, in detailing the officers named to compose the court-martial, acted in pursuance of law. The sentence cannot be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable.

The same considerations, we submit, are controlling here. There may have been the very best of reasons why the appointing authority considered the two officers of the Judge Advocate General's Department "not available for the purpose." Certainly it cannot be said that 2d Lieutenant Swan, JAGD, was more qualified to perform the duties of law member than was Colonel Darling, the latter an officer of over twenty years' commissioned service.[9] Significantly, in the argument concerning the alleged ineligibility of Colonel Darling as law member, it was never suggested that Swan, who was present at the time as assistant trial judge advocate, should have been made law member rather than Darling (*supra,* p. 12). With respect to Lieutenant Colonel Beatty, JAGD, there is nothing in the record to show that he was available for appointment as law member on May 16, 1947, the date when the court-martial was appointed (CM R. 96). He was, it is true, available, in the sense of "physically accessible,"

[9] 1 Official Army and Air Force Register (1948), p. 423.

on May 21, 1947, when he was appointed as defense counsel for both petitioner and Felman in lieu of Lieutenant Colonel Mosely, who had asked to be relieved on the ground of disqualification (*supra*, p. 11). But as between providing the accused with Beatty's services as a lawyer and placing him on the court, considerations of justice may well have dictated the former course. As the Board of Review said (CM R. 11), "the appointment of an officer of the Judge Advocate General's Department as defense counsel, instead of as law member, may, in a case of this nature, reasonably be considered a wise exercise of discretion by the appointing authority and a concession in the benefit of the accused." The fact that petitioner had a personally retained attorney on hand to represent him when the court-martial reconvened on May 28, 1947, did not mean that Beatty's services as defense counsel were no longer required. On the contrary his services were specifically requested by the codefendant, Felman, until such time as Felman's choice for counsel, Captain McCleod, could be present, and Beatty in fact continued to represent Felman until the severance was granted. Indeed, as we have indicated (*supra*, p. 13), while the record is not clear on the matter, it appears that even after Felman was granted a severance, Beatty continued on as co-counsel with Mondell, petitioner's special attorney.

Other considerations which may have influenced the appointing authority in his decision not to

place 2d Lieutenant Swan or Lieutenant Colonel Beatty on the court as law member might be mentioned.[10] But it is unnecessary to speculate on these matters. The statute commits the discretion to the appointing authority, and the decisions cited make it plain that this discretion may not be collaterally reviewed.[11]

CONCLUSION

For the reasons stated, we oppose the granting of the petition for certiorari with respect to the third question presented (petitioner's second question presented),[12] and suggest that as to the first

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[10] Not every officer of the Judge Advocate General's Department is, *virtute officii*, qualified to rule on questions of evidence arising in the course of a trial; there are many lawyers even in civil life, of eminence and ability, whose talents do not lie in that direction.

[11] A recent district court decision, *Brown* v. *Hiatt*, 81 F. Supp. 647 (N. D. Ga.), decided November 17, 1948, is contrary to the decisions of both courts below in respect of the AW 8 issue. There, a court-martial sentence was declared void on habeas corpus on the sole ground that the law member was not an officer of the Judge Advocate General's Department, it appearing from the record that an officer of that Department was "available" in that he was detailed at the trial as assistant trial judge advocate. For the reasons given in the text, we believe the decision erroneous and have appealed it to the Court of Appeals for the Fifth Circuit.

[12] Our question 1 is substantially the same as petitioner's question 1 (Pet. 3). The petition does not expressly recognize our question 2 (the jurisdictional question with respect to AW 70) as a "question presented."

two questions the Court enter an appropriate order in the light of the decision to be reached in *Humphrey* v. *Smith*, No. 457.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 598

FREDERIC HENRY,

Petitioner,

v.

LT. GENERAL WALTER BEDELL SMITH, Commanding General, First Army, Fort Jay, New York,

Respondent.

PETITION FOR RE-HEARING ON DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTION

Petitioner herein files a petition for re-hearing of the order denying a petition for writ of certiorari in this case, entered on May 2, 1949. Said petition is filed in accordance with Rule 33, paragraph 2, of the Rules of the Supreme Court of the United States, effective January 1, 1949.

QUESTIONS PRESENTED

While petitioner contended that jurisdictional requirements set forth in Article of War 8 and Article of War 70 had been violated, there is likewise presented the far

greater question of whether the General Court Martial had any jurisdiction to impose any sentence upon the petitioner.

The petitioner did not get an opportunity to examine or see the proceedings of the Board of Review in this case, until after the original petition for habeas corpus had been filed in the District Court for the Southern District of New York. He based his application for release on violations of Article of War 8 and Article of War 70. However, the petition as framed is broad enough to cover all errors pertaining to jurisdiction (Paragraph 16 Petition for Writ of Habeas Corpus), which were raised before the Board of Review. Inasmuch as the decision of the District Court was favorable to the petitioner, the question of jurisdiction of the offense was not passed upon directly by either the Court of Appeals, Second Circuit, or this court.

The record shows that while the General Court Martial found the defendant guilty of embezzlement, the Board of Review unanimously found that he was not guilty of that offense. Two of the three members held he was guilty of fraudulent conversion, an offense with which he was not charged, and which is not an included offense. One member dissented holding the petitioner was not guilty (Court Martial Record, pages 3-18).

If the dissenting member of the Board was right, then the petitioner has been incarcerated and dismissed from the service without violating any military law whatsoever.

The respondent admits in its return that the finding of the Secretary of the Army is to the effect that the "specification is approved as involves findings that the accused did, at the time and place alleged, fraudulently convert to his own use the silver bullion described, of the value of over Fifty Dollars ($50.00), of the ownership alleged, in violation of Article of War 96."

A Board of Review under the Acts of Congress can find the accused guilty of a lesser offense only if there is a lesser *included* offense. Fraudulent conversion is not a lesser included offense where embezzlement has been charged.

ARGUMENT

I. Board of Review Had No Jurisdiction to Impose Penal Sentence.

It is true that the authority of this court to review court martial judgments does not permit the court to pass on the guilt or innocence of persons convicted by courts martial. *Carter* v. *McClaughry*, 183 U. S. 365, 381; *In re Yamashita*, 327 U. S. 1, 8-9.

However, it is equally true that a sentence for a non existing offense could be challenged on habeas corpus. As pointed out by Justice Clarke in *Collins* v. *McDonald*, 258 U. S. 416, 418, the questions in such proceedings are:

> "Did the court martial which tried and condemned the prisoner have jurisdiction of his person and of the offense charged, and *was the sentence imposed within the scope of its lawful powers.*"

The general rule is well stated in the Naval court martial case of *Ex parte Mulvaney*, 82 Fed. Supp. 743, 745:

> "It is beyond question that a court must have jurisdiction over both the person and the offense in order to render a valid judgment."

We take it this applies to actions of the Board of Review as well as the general court martial itself.

The Board of Review unanimously found that the petitioner was not guilty of embezzlement as the general court martial at Regensberg had found. Had there been one member with any legal training on that Court Martial, as

provided by Article of War 8, it would have had to reach the same result.

Having found the petitioner not guilty of embezzlement, the powers of the Board of Review were definitely prescribed by the Articles of War enacted by Congress.

Article of War 47 (Title 10, Section 1518, U. S. Code) provides:

> "Art. 47 Powers Incident to Power to Approve.—The power to approve the sentence of a court-martial shall be held to include:
>
> (a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of *a lesser included offense* when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and
>
> (b) The power to approve or disapprove the whole or any part of the sentence.
>
> (c) The power to remand a case for rehearing, under the provisions of article 50½."

In other words the power of the Board to substitute a different offense is limited to those cases where there is a *lesser included offense.* Two members of the Board of Review, after the entire Board had found the petitioner not guilty of embezzlement, found the defendant guilty of fraudulent conversion, the third member dissenting.

Fraudulent conversion is not a lesser included offense, and Member Lynch points this out quite specifically (Court Martial Record, pages 17-18).

Embezzlement is a statutory offense. Under army rules it is defined:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come." *Manual*

of Courts Martial, page 173. Citing *Moore* v. *United States,* 160 U. S. 268.

Despite a ruling by the Judge Advocate General [*Digest of Opinions J. A. G.* 1912-40 Section 451 (21)] there are no cases found where fraudulent conversion has been held to be included in embezzlement.

If the jury is asked to pass on the offense of embezzlement the verdict must be guilty or not guilty. It cannot be guilty of fraudulent conversion. This is because embezzlement is of a purely statutory nature. See *United States* v. *Smith,* 124 U. S. 325; *Moore* v. *United States,* 160 U. S. 268; *United States* v. *Mason,* 218 U. S. 517; *Tredwell* v. *United States,* 266 Fed. 350; *State* v. *Channer,* 115 Oh. St. 350; 146 L. R. 540 et seq.

We, therefore, contend that since the petitioner was found not guilty of embezzlement, under the provision of Article of War 47, the Board of Review had no jurisdiction to substitute the offense of fraudulent conversion with which petitioner was not charged or placed upon trial. The powers of the Secretary of the Army acting for the President in reference to the sentence were no greater than those of the Board of Review (Article of War 48, 49, Title 10 Section 1519 and 1520, U. S. Code), to confirm a void sentence.

Since there was no jurisdiction to sentence for the offense of fraudulent conversion, petitioner was unlawfully held in custody.

II. Article of War 8

This court denied review even though the decision of the Court of Appeals, Second Circuit, is opposed to the decision in *Brown* v. *Hiatt,* 81 Fed. Supp. 647 (N. D. Ga.), which was based upon and followed *Runkle* v. *United States,* 122 U. S. 543; *McClaughry* v. *Deming,* 186 U. S. 49, 63.

Since there were legal points involving the question whether there was jurisdiction to sentence for a non-existing offense, the importance of having a person with some legal knowledge appointed on a general court martial is specifically demonstrated.

Under the revision of the Articles of War, it is now said that it is expressly made mandatory that a member of the Judge Advocate General's Department or one with legal experience be on a general court martial. The language of Article of War 8 at present is the same as under former Article of War 8, except that the following is omitted "except that when an officer of that department is not available for that purpose, the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member."

With this exception, we still maintain that former Article of War 8 was mandatory; and there is nothing to show that Colonel Darling, a Cavalry officer, who sat as president and law member, and not, therefore, subject to peremptory challenge, was specially qualified to act as law member. His rulings throughout the trial indicated he was not so qualified.

In other words, while it is now conceded a lawyer must act as law member, there is nothing in the revision of the Articles of War, which by any proper construction would hold that Article of War 8 as formerly written was not mandatory. If the same reasoning and interpretation, namely the comparison of the present and the former language of the Article of War, and the reports of Congress, which was employed in *Humphrey* v. *Smith*, No. 457, is used in interpreting Article of War 8 in the present case, reversal of the judgment of the Court of Appeals of the Second Circuit would follow as a matter of course.

III. Article of War 70

We submit that this court in *Humphrey* v. *Smith,* No. 457, construed Article of War 70 contrary to even the present Congressional intent.

In 1947, the House Committee on Armed Services reported out a bill to amend the Articles of War and said (H. Rep. 1034, 80th Cong., 1st sess., p. 7):

> "4. Should the pre-trial investigation be made mandatory and should accused be furnished counsel at such investigation?
> This question presents a more difficult problem than is apparent. In our consideration of the subject of military justice we have been guided by the principle that the basic rights of an accused should be protected without encumbering the military system in such a maze of technicalities that it fails in its purpose. *Upon this premise we have concluded that an investigation* should precede every general courts-martial trial but *that the investigation should be considered sufficient if it has substantially protected the rights of the accused.* To hold otherwise would subject every general courts-martial case to reversal for jurisdictional error on purely technical grounds."

Congress felt that Article of War 70 should be substantially complied with by a court martial. This court holds, in *Humphrey* v. *Smith,* that Article of War 70 is not jurisdictional and can be ignored completely. This is not what Congress said in its report.

The court relied on what the Secretary of the Army said, but apparently failed to consider the Congressional report.

CONCLUSION

For the reasons stated petitioner most respectfully urges that this petition for re-hearing be granted.

Respectfully submitted,

ROBERT N. GORMAN,

STANLEY A. SILVERSTEEN,

Attorneys for Petitioner.

We the undersigned hereby certify that this petition for re-hearing is filed in good faith, and not for the purposes of delay and is restricted to matters contained in Rule 33, paragraph 2 of the Rules of the Supreme Court of the United States.

Robert N. Gorman

Stanley A. Silversteen